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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1985

RICHARD THORNBURGH, *et al.*,  
v. *Appellants,*

AMERICAN COLLEGE OF OBSTETRICIANS AND  
GYNECOLOGISTS, PENNSYLVANIA SECTION, *et al.*,  
*Appellees.*

On Appeal from the United States Court of Appeals  
for the Third Circuit

BRIEF FOR THE  
NATIONAL ABORTION FEDERATION  
AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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**BRIEF FOR THE  
NATIONAL ABORTION FEDERATION  
AS AMICUS CURIAE IN SUPPORT OF APPELLEES**

**INTEREST OF THE AMICUS CURIAE**

The National Abortion Federation ("NAF") submits this brief in support of appellees.<sup>1</sup> NAF, a not-for-profit professional organization, was founded in 1977 and is composed primarily of clinics and physicians providing abortion services. Currently, NAF members include 306 providers in 46 states, the District of Columbia, Puerto Rico and Canada, including three of the five original plaintiffs, now appellees, in this case.<sup>2</sup> NAF's primary objective is to unite providers of abortion services into a professional community dedicated to quality care. NAF provides professional standards,<sup>3</sup> guidelines, training and education and serves as a clearinghouse for information and advice to abortion-service professionals and the general public.

NAF's headquarters in Washington, D.C. were fire-bombed by self-professed antiabortionists on July 4, 1984.<sup>4</sup>

**THE QUESTION ADDRESSED BY THIS BRIEF**

This brief addresses the unconstitutionality of Pennsylvania's public disclosure requirements for reports filed by providers of abortions under § 3214(a) and (h) of the 1982 Pennsylvania Abortion Control Act. NAF submits that the disclosure requirements are unconstitutional under the standards set forth in *Roe v. Wade*,

<sup>1</sup> The parties have consented to the filing of this brief. Their letters of consent are being filed with the Clerk of the Court.

<sup>2</sup> The NAF members are the Elizabeth Blackwell Health Center for Women; Reproductive Health and Counseling Center; and Women's Health Services, Inc.

<sup>3</sup> Copies of NAF *Standards for Quality Care*, reprinted as of April 1984, are being lodged with the Clerk of the Court.

<sup>4</sup> See *Summary of Clinic Violence as Reported to the National Abortion Federation*, discussed *infra* p. 13. Two antiabortionists pled guilty and a third was convicted for ten bombings, including that of NAF's headquarters. See *Third Abortion Clinic Bomber Sentenced to 15 Years*, Wash. Post, July 27, 1985, at D1.

410 U.S. 113 (1973), and its progeny in this Court, for reasons in addition to those relied upon by the court of appeals below.

In this brief, NAF demonstrates that Pennsylvania's disclosure requirements would expose physicians, women who choose abortion and abortion clinics to antiabortionist violence and harassment. The materials discussed below, of which this Court may take notice, establish that bombings, arsons, death threats, assaults and clinic invasions are escalating dramatically. This brief explains how Pennsylvania's public disclosure requirements will help antiabortion activists to target physicians, other abortion providers and women who choose abortion for even more violence and harassment. It also shows still other adverse effects of public disclosure, the lack of any need for it, and Pennsylvania's departure from accepted practices relating to medical records.

### STATEMENT

#### A. The Public Disclosure of Information Concerning Abortions Required by the 1982 Pennsylvania Abortion Control Act

The 1982 Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. Ann. §§ 3201-3220 (Purdon 1983) (hereinafter cited as "1982 Act"), requires providers of abortion services to submit to the Pennsylvania Department of Health four types of reports that are to be available for public inspection and copying. These publicly available reports contain detailed information about each abortion performed in Pennsylvania, the patient and the provider of the abortion. Penalties for failure to file the required reports include fines, suspension or revocation of licenses, and criminal liability. The reporting and public disclosure provisions of the 1982 Act apply equally to abortions performed in the first, second and third trimesters.

The provisions requiring two of these four types of reports were held unconstitutional by the court of appeals and are therefore before this Court:

(1) Section 3214(a) of the 1982 Act requires that a "report of each abortion performed shall be made to the [Department of Health] on forms prescribed by it."<sup>5</sup> Section 3214(b) requires the physician who performs the abortion to sign this report, and § 3214(e)(2) requires the Department of Health to make it available for public inspection and copying, subject only to the limitation that "a unique identifying number" be substituted for "the name of any physician which appears on the report." This report includes statutorily required information about the identity of the physician who performed the abortion, the facility where the abortion was performed<sup>6</sup> and any referring physician, agency or service; the political subdivision in which the woman resides; her age, race and marital status; the number of her prior pregnancies; the date of her last menstrual period and the probable gestational age of the "unborn child"; the date and type of procedure; a description of any complications; information relating to viability; length and weight of the "unborn child"; the basis for determination of "medical emergency" (if applicable); the date of the statutorily required medical consultation; the date of determination of pregnancy; and the method of payment for the abortion. The form promulgated by the Department of Health additionally requires information about the woman's education, the number of her living and dead children, and previous spontaneous and induced terminations of pregnancy.

(2) Section 3214(h) further requires physicians to file reports of any complications "resulting, in the good

<sup>5</sup> Copies of the report forms promulgated by Pennsylvania's Department of Health pursuant to these subsections, entitled "Report of Induced Termination of Pregnancy," are reproduced in the Appendix to this brief.

<sup>6</sup> The public report may often identify private physicians performing abortions despite the substitution of a number because private physicians' offices where abortions are performed must be identified.



faith judgment of the physician, from . . . an abortion or attempted abortion." These reports, which § 3214(h) makes available for public inspection and copying, must state the age of the patient; the number of previous pregnancies; the number and type of previous abortions; the name and address of the facility where the abortion was performed; the gestational age of the "unborn child"; the type of abortion performed; the nature of the complications; the medical treatment given; and the nature and extent, if known, of any permanent condition caused by the complications.<sup>7</sup> This form, which must be signed by the physician, additionally requires information about the number of the woman's living and dead children, the date of the abortion, the date of the physician's first examination of the patient, and the physician's license number.

#### **B. Pennsylvania Previously Protected the Confidentiality of Records About Abortion Providers and Their Patients**

The 1982 Act replaced Pennsylvania's 1974 Abortion Control Act, 35 Pa. Cons. Stat. Ann. §§ 6601-6608 (Purdon 1977) (hereinafter cited as "1974 Act"). Section 6606(d) of the 1974 Act required abortion facilities to keep in their own files records of each abortion performed.<sup>8</sup> Section 6606(d) specifically provided that

<sup>7</sup> The form promulgated by the Department of Health, entitled "Abortions: Report of Complications," is reproduced in the Appendix to this brief.

<sup>8</sup> *Planned Parenthood Association v. Fitzpatrick*, 401 F. Supp. 554 (E.D. Pa. 1975), *aff'd mem. in part sub nom. Franklin v. Fitzpatrick and vacated and remanded mem. in part sub nom. Beal v. Franklin*, 428 U.S. 901 (1976), invalidated as unconstitutional the reporting provisions of § 6606(d) requiring the name and address of the patient's spouse; the name and address of the patient's parent or person *in loco parentis*; and a "full statement of those facts upon which the person performing the abortion relied as establishing that the abortion was necessary to preserve the life or health of the mother."

"[a]ll information and documents required by this subsection shall be treated with confidentiality customarily accorded to medical records."

Section 6606(e) of the 1974 Act further required each facility performing abortions to file quarterly reports with the Department of Health showing the total number of abortions performed during that quarter year and the total number of abortions performed in each trimester of pregnancy. In 1978, the Department of Health implemented a policy to delete the names of private practitioners providing abortion services from its publicly available lists, in order "to prevent those providers from possible harassment and abuse as has occurred in the recent past."<sup>9</sup>

Beginning in 1980, the Department of Health implemented a further policy to separate the abortion records submitted by all facilities from the cover sheets identifying the facilities.<sup>10</sup> This policy was implemented "to avoid the possibility that certain facilities and physicians could be pressured and possibly harassed by members of the public objecting to the medical abortion practice" and because the department recognized that it had "no need

<sup>9</sup> See *Department of Health Position on the Dissemination of Abortion Statistics*, marked as Exhibit A, and letters dated March 22, 1979 and April 24, 1979 between the Pennsylvania Secretary of Health and the Executive Director of the Office of the Democratic Policy Committee Chairman, marked as Exhibits B and C, copies of which are being lodged with the Clerk of the Court. These exhibits and others marked with letters have been reproduced from attachments to Plaintiffs' Memorandum of Law in Support of an Injunction Against Enforcement of the Public Disclosure Requirements of Sections 3207(b) and 3214(f) of the Pennsylvania Abortion Control Act, filed in the district court in a subsequent phase of the present case.

<sup>10</sup> See the subsequent district court decision in this case, *American College of Obstetricians and Gynecologists v. Thornburgh*, Civil Action No. 82-4336, slip op. at 4 (E.D. Pa. June 17, 1985). Copies of this decision are being lodged with the Clerk of the Court.

to match the identity of the facility with its statistical report.”<sup>11</sup>

### C. Pennsylvania's Reversal of Previous Policy in Enacting the 1982 Act

The Pennsylvania Department of Health's 1980 policy frustrated a number of Pennsylvania legislators who sought to obtain information about abortion providers on behalf of their constituents.<sup>12</sup> The disclosure requirements of the 1982 Act were designed to reverse this policy. The legislative history of the 1982 Act reflects the view that:

[P]eople should have the right to know, for scientific reasons, the abortions that are being performed, at what stage, at what term, any complications, and in addition, they should have the right to know the organizations and individuals who are performing abortions so that they can decide whether or not to patronize these organizations and individuals.

77 Pa. Legis. J. House 2269-70 (Dec. 8, 1981). The legislative history specifically decries the problems encountered by one Pennsylvania legislator who previously had challenged the Department of Health's policy of separating the page of the report identifying the facility from the sheets containing the statistical information. As intended, the 1982 Act now requires the identity of abortion facilities and detailed information about those facilities to be publicly disclosed, along with the medical and personal

<sup>11</sup> See *id.* at 4, 43. Copies of the June 23, 1980 policy, identified as Exhibit D, are being lodged with the Clerk of the Court. The district court also cited a May 4, 1981 letter from the Chief Counsel of the Department of Health, Plaintiffs' Exhibit 7, copies of which are being lodged with the Clerk of the Court as Exhibit G.

<sup>12</sup> See, e.g., Exhibit E (memorandum dated February 13, 1981 from the Chief Counsel of the Pennsylvania Department of Health reflecting a telephone call with a Pennsylvania legislator who challenged the department's policy) and Exhibit F (May 1, 1981 letter from the department's Chief Counsel to a Pennsylvania legislator explaining the department's policy). Copies of Exhibits E and F are being lodged with the Clerk of the Court.

histories of women choosing abortions, which were formerly protected as confidential medical records.

### D. Proceedings Below

The proceedings below resulted in the court of appeals' holding many provisions of the 1982 Act unconstitutional, including the reporting requirements of § 3214(a), (b), (e) and (h) discussed in this brief. The court of appeals found that these reporting requirements would have a significant impact on the woman's abortion decision because they would increase the cost of abortions. Further, the court observed that the state had "proffered no compelling state interest to justify much of the detail required." *American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283, 302 (3d Cir. 1984). The court noted "additional objections to some of the specific information required." *Id.* For example, "the compulsion that a physician report the basis for his or her medical judgment at various stages appears inconsistent with the [Supreme] Court's directive that a physician be accorded broad discretion, and could have a profound chilling effect on the willingness of physicians to perform abortions." *Id.* (citing *Colautti v. Franklin*, 439 U.S. 379, 396 (1979)). The court did not reach the questions whether these provisions also unconstitutionally invaded the privacy of the mother or impaired the exercise of abortion rights through public disclosure.

After remand, the United States District Court for the Eastern District of Pennsylvania held proceedings on the validity of §§ 3207(b) and 3214(f) of the 1982 Act, which require that abortion facilities be identified and that information about those facilities be made public. After hearing evidence on the effects of such disclosure, the district court entered an injunction requiring Pennsylvania to maintain in confidence, and not make available for public disclosure, reports filed pursuant to those sections. The district court's June 17, 1985 decision (hereinafter cited as "1985 district court decision") made



extensive findings of fact concerning harassment and acts of violence directed at abortion facilities and their patients. The court concluded that "there is a reasonable probability that the disclosure requirements will result in increased threats, harassment, or reprisals and will therefore impose a legally significant burden on the constitutional right to choose to have an abortion." Slip op. at 31.<sup>13</sup>

### INTRODUCTION AND SUMMARY OF ARGUMENT

*Roe v. Wade*, 410 U.S. 113 (1973), and subsequent decisions of this Court establish and confirm the principle that during the first trimester of pregnancy, a woman "must be permitted, in consultation with her physician, to decide to have an abortion and to effectuate that decision 'free of interference by the State.'" *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 429-30 (1983) (quoting *Roe v. Wade*, 410 U.S. at 163). Consequently, state regulations covering the first trimester, such as the disclosure requirements of the 1982 Act, are permitted only if they "have no significant impact on the woman's exercise of her right" and if "the State [meets] its burden of demonstrating that [the] regulations further[] important health-related State concerns." *Akron*, 462 U.S. at 429-30. Even after the first trimester, a state's regulation of abortion procedures must "reasonably relate[] to the preservation and protection of maternal health" and must not "depart from accepted medical practice." *Id.* at 430.

This Court has upheld certain recordkeeping and reporting requirements in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), and in *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983). The requirements in *Danforth* and *Ashcroft*, however, were "reasonably directed to the preservation of maternal health and . . . properly respect[ed] a patient's confidentiality and privacy," did

<sup>13</sup> The 1985 district court decision is not before this Court for review.

not "significantly differ from those imposed with respect to other, and comparable, medical or surgical procedures," and were not unduly burdensome. *Danforth*, 428 U.S. at 80-81; see also *Ashcroft*, 462 U.S. at 490 n.14.

The court of appeals correctly held that the reporting requirements discussed in this brief, which concern individual abortions and complications, violated these constitutional standards. This brief additionally demonstrates that the provisions for public disclosure of such reports are unconstitutional because they improperly interfere with the abortion decision, violate patients' rights of privacy, and serve no valid state interest.

Pennsylvania's public disclosure requirements are especially distressing in light of the extensive evidence of antiabortionist harassment of and violence directed at abortion providers and their patients. The information to be disclosed permits targeting of abortion facilities for violence and harassment, thereby restricting access to safe abortions. In addition, the amount of detailed personal information required to be disclosed makes the woman who has chosen to terminate her pregnancy through abortion easily identifiable, thereby facilitating harassment of patients as well as violating their privacy rights. Moreover, the public disclosure requirements directly interfere with the abortion decision because a woman who does not wish to sacrifice her privacy right in maintaining the confidentiality of such information must sacrifice her independence in making the abortion decision.

Pennsylvania has not offered, nor could it offer, any compelling state interest to justify this interference with the abortion decision. Further, the disclosure requirements are inconsistent with the practices of other states, the federal government and professional organizations, which disclose only aggregate statistical information and strictly protect the confidentiality of information about specific facilities, physicians and patients.

## DISCUSSION

# I. THE PENNSYLVANIA DISCLOSURE REQUIREMENTS UNCONSTITUTIONALLY INTERFERE WITH THE ABORTION DECISION AND VIOLATE PATIENTS' PRIVACY

## A. Public Disclosure of Sensitive Abortion Information Facilitates Antiabortionist Violence and Harassment

### 1. *The concerted program of violence and harassment directed against abortion providers and their patients*

In recent years, both women who seek abortions and physicians who provide abortions have been targets of a rising tide of antiabortionist violence and harassment. Many leaders of the antiabortion movement have shifted their emphasis away from advocating changes in the law to applying "direct action" against abortion providers and their patients. "[P]ro-life activists cannot wait for the legislative and judicial process that will make abortion illegal. . . . [T]he activities and methods proposed in this book are *intended* to interfere with and even stop the business of abortion. . . ." J. Scheidler, *Closed: 99 Ways to Stop Abortion* 17-18 (1985) (hereinafter cited as "*99 Ways*") (emphasis in original).<sup>14</sup>

As head of the Pro-Life Action League, [Scheidler] . . . uses prayer, sidewalk counseling, sit-ins, graffiti, lawsuits, "inflammatory rhetoric," horror stories, ghastly pictures, pressure of all sorts.

Sobran, *Sudden Impact*, Nat. Rev. 41, 42 (June 28, 1985).

Abortion providers and their patients are subjected to harassment that includes:

<sup>14</sup> See also *It's Not Terrorism to Stop the Slaughter*, USA Today, Nov. 23, 1984, quoting Curtis Beseda, convicted of four counts of bombing and arson of abortion clinics, as stating that: "Direct action simply recognizes what in fact is taking place, that innocent human lives are being destroyed, and that the only appropriate response is one that stops this killing."

blocking the entrances to clinics or clinic parking lots; threatening, harassing, intimidating, insulting, molesting, pushing, elbowing or shouldering patients or staff; peering into or shouting through clinic windows; trespassing on private property; invading clinics; shouting abusive epithets or obscenities at patients; photographing or videotaping patients; engaging in face-to-face harassment; using . . . voice amplification; interfering with or harassing patients or clinic staff at their homes; making phone calls intended to disrupt clinic operations; and making false appointments.

Donovan, *The Holy War*, 17 Fam. Plan. Persp. 5, 7 (1985) (hereinafter cited as "*The Holy War*").<sup>15</sup>

Numerous antiabortion groups espouse "direct action" to restrict and deny access to abortion services. In May 1984, more than 600 abortion foes held a three-day conference on how to close abortion clinics and discourage women from choosing abortion. *The Holy War* at 8. Attendees were urged to use direct action to "shut down the abortion industry." *Id.* (quoting W. Cumbie, National Conference on Pro-Life Activism, Fort Lauderdale, Fla., May 12, 1984). A second activist conference was held in Wisconsin in April 1985. *99 Ways* at 240.<sup>16</sup>

<sup>15</sup> Many of these tactics are openly advocated by Scheidler in *99 Ways*. See, e.g., chapter 1 (Sidewalk Counseling); chapter 2 (Truth Teams) (couples who pose as clients for abortion to gain access to the waiting room in order to change patients' minds); chapter 3 (Picket and Demonstration); chapter 33 (Sit-Ins); chapter 37 (Picket the Abortionists' Homes); chapter 47 (Use "Inflammatory Rhetoric"); chapter 53 (Use Private Detectives); chapter 57 (Conduct a Blitz (clinic invasion)); chapter 58 (The Bullhorn); chapter 60 (Get Information from License Plates); chapter 86 (Special Clinic Closing Programs: Project Jericho, Three Month Blitz, and Others); chapter 90 (Make Appointments); chapter 91 (Telephone Calling).

<sup>16</sup> Many antiabortion groups pay no heed to the stage of the pregnancy, the cause of the pregnancy or the effect of the pregnancy on the life or health of the woman. For example, the ALL News, published by the American Life Lobby, Inc., recently carried



Antiabortionist harassment of physicians who provide abortion services is widespread. A recent article in the New York Times Magazine vividly describes the intimidating tactics aimed at one doctor who performs abortions in a small Oregon town. In addition to picketing the physician, antiabortionists have likened his clinic to Auschwitz, attempted to firebomb his clinic on two occasions, and mailed him threatening letters, one of which threatened to decapitate him.<sup>17</sup>

Antiabortionist violence was the subject of congressional hearings in March 1985. Directors of a number of abortion facilities testified about numerous instances of "malicious harassment and intimidation of clinic staff and patients and unlawful activities. . . ." *Abortion Clinic Violence: Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Comm. on the Judiciary, 99th Cong., 1st Sess. (1985)* (hereinafter cited as "*Hearings*") (statement of Beverly Whipple, Executive Director, Feminist Women's Health Center).<sup>18</sup> The Feminist Women's Health Center in Everett, Washington was forced to close after three arson fires. *Id.* Planned Parenthood of Connecticut experienced three bomb threats, forcing evacuation of its building during surgical procedures. *Hearings* (statement of Joan Babbott, Executive Director of Planned Parenthood of Connecticut). The offices of Hillcrest Clinic, a first-trimester outpatient

a story entitled, "Abortion *Forced* on Invalid After Guardianship Granted to Mom." (Emphasis added.) The invalid in question was a 35-year-old victim of Huntington's chorea, weighing 75 pounds, who had been raped at a nursing home. ALL News, June 28, 1985, at 1. American Life Lobby takes the position that "[r]ape and incest are not legitimate exceptions and will be used as loopholes to justify public funding of many abortions." Letter dated April 16, 1984 concerning H.R. 1510, copies of which have been lodged with the Clerk of the Court.

<sup>17</sup> N.Y. Times, Aug. 11, 1985 (Magazine), at 18, 28.

<sup>18</sup> Copies of statements submitted in these hearings, which have not been concluded and are not published, are being lodged with the Clerk of the Court.

abortion facility in Norfolk, Virginia, were set on fire in 1983 and a bomb was exploded outside the building in 1984. *Hearings* (statement of Heather C. Green, Director of Community Education, Hillcrest Clinic).

Between January 1, 1981 and July 19, 1985, 416 acts of antiabortionist violence were reported to NAF, 135 of which took place between January 1, 1985 and July 19, 1985. Only nine such incidents were reported in 1981. These acts include bomb threats; clinic invasions; vandalism; death threats; assaults or batteries; burglaries; attempted arson or bombings; arsons; and bombings.<sup>19</sup> These figures do not include incidents of picketing and harassment or hate mail or harassing phone calls.<sup>20</sup>

The 1985 district court decision enjoining enforcement of two additional disclosure provisions of the 1982 Act found that:

[P]ro-life protests have increased in frequency and intensity and at times have exploded into violent confrontations . . . . Several of plaintiffs' witnesses testified about takeovers of clinics by pro-life demonstrators which have resulted in arrests of up to thirty people at a time. Women entering and leaving clinics have been verbally harassed. . . . The pat-

<sup>19</sup> Information concerning these reports is set forth in NAF's *Summary of Clinic Violence as Reported to the National Abortion Federation*, copies of which are being lodged with the Clerk of the Court.

<sup>20</sup> Even some moderate elements of the antiabortion movement have failed to condemn violence against abortion clinics. For example, John Willke, President of the National Right to Life Committee, suggests that the only way to stop the antiabortion violence is "to stop the violence inside the doors [of the abortion clinics] that is causing it." Willke, *Opposing Clinic Violence*, Nat. Right to Life News, Jan. 10, 1985, at 3. The Pro-Life Action League, one of the more militant antiabortion groups, refuses to condemn the destruction of abortion facilities "because we refuse to cast the abortionists in the role of victim when they are in fact victimizers. . . ." *Hearings* (statement of Joseph Scheidler, Director, Pro-Life Action League).



tern of hostile behavior which has developed in the past two years has also included picketing and verbal harassment of clinic physicians and staff members by name both at their facilities and at their homes and attempts to block ingress and egress at facilities.

Slip op. at 25-26. Similarly, a recent Washington State Superior Court decision found that antiabortionist picketing of a Medical Building occupied by over two dozen medical offices had created a "clear and present danger" to patients and physicians.<sup>21</sup>

Proponents of "direct action" purport to justify these tactics by invoking the First Amendment and the "defense of necessity." Although these justifications are without basis and have been widely rejected, the persistence of their assertion confirms the growing scope and militancy of antiabortionist violence and harassment.<sup>22</sup>

<sup>21</sup> Evidence was presented that one woman, who was miscarrying and bleeding heavily, was delayed in entering the building for emergency care. Another woman's already high blood pressure was exacerbated to dangerous levels because the picketers upset her. The court further found that ingress and egress of persons visiting or working at the Medical Building had been obstructed; that picketing had been disorderly, coercive and aggressive; and that "'counseling' had been forced upon those attempting to enter or leave the building." *Bering v. SHARE*, Civ. No. 85200796, Findings of Fact and Conclusions of Law at 4, 5 (Wash. Super. Ct. Mar. 22, 1985), appeal docketed, No. 51533-6 (Wash. Mar. 28, 1985). Copies of this unreported decision are being lodged with the Clerk of the Court.

<sup>22</sup> The necessity cited by appellants [that their actions were necessary to save human life] cannot shield them from criminal liability for their acts. . . . The rights to free speech, to assembly and to petition the government for grievances are a cornerstone of the American system. So, too, is the right to be free from criminal interference. These appellants trespassed on the rights of others and did so without excuse. *Gaetano v. United States*, 406 A.2d 1291, 1295 (D.C. 1979); see also *Hoffart v. Texas*, 686 S.W.2d 259 (Tex. Crim. App. 1985); *Sigma Reproductive Health Center v. Maryland*, 297 Md. 660, 467 A.2d 483 (Md. 1983); *St. Louis v. Klocker*, 637 S.W.2d 174 (Mo.

## 2. *The Pennsylvania disclosure requirements facilitate identification of targets for antiabortionist violence and harassment*

Although antiabortionist literature contains advice about how to identify individual abortion patients, clinics, physicians and staff members, it recognizes the difficulty of obtaining desired information. Current techniques include photographing patients and recording license plate numbers of physicians, staff members and patients. Nevertheless, it can be difficult to identify the holder of a particular license plate<sup>23</sup> and some abortion facilities and physicians do not advertise their services.<sup>24</sup>

These obstacles to identification largely would be eliminated by the disclosure requirements of the 1982 Act.

App. 1982); *Cleveland v. Anchorage*, 631 P.2d 1073 (Alaska 1981); *People v. Stiso*, 93 Ill. App. 3d 101, 416 N.E.2d 1209 (Ill. App. Ct. 1981); *People v. Krizka*, 92 Ill. App. 3d 288, 416 N.E.2d 36 (Ill. App. Ct. 1980). See Note, *Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic*, 48 U. Cinn. L. Rev. 501, 502-03 (1979).

A discussion of whether the First Amendment does or should protect conduct engaged in by antiabortion activists is beyond the scope of this brief. This Court has held that time, place and manner restrictions are reasonable if "the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

<sup>23</sup> It is currently difficult to identify a physician from a license plate number without "hav[ing] a friend in the traffic division or in the Secretary of State's Office. Ordinarily, if you call up the license bureau with a license number and ask for the name and address of the owner, you will get a runaround and may have a hard time getting it." 99 *Ways* at 221.

<sup>24</sup> See Defendants' Supplemental Memorandum of Law in Opposition to a Preliminary Injunction Against Enforcement of the Public Disclosure Provisions of Sections 3207(b) and 3214(f) of the Pennsylvania Abortion Control Act at 7, filed in the subsequent district court proceeding in this case. See also 99 *Ways* at 325: "Finding out which hospitals perform abortions is more difficult than discovering the abortion clinics, because hospitals rarely advertise their abortion program."

The publicly available reports of individual abortions and complications required by § 3214(a) and (h) would provide a great deal of personal information about individual patients, excluding only their actual names and addresses. It would not be difficult to identify from a report required by § 3214(a), for example, a college-educated 28-year-old Asian woman with three living children in a small Pennsylvania town who underwent an abortion at a particular clinic on a particular date. In many cases, antiabortion activists would not have to depend upon surreptitious help from friends in motor vehicle bureaus to identify particular physicians, because the identity of every abortion facility, including private physicians' offices, would be publicly available. The names of physicians preparing reports of complications required by § 3214(h) would be evident on the reports themselves. A physician who both performs an abortion on a patient and who subsequently treats that patient for a complication thus would be identifiable from the face of the complications report.

Further, the number and type of abortions performed at each facility could readily be determined by an analysis of these reports.<sup>25</sup> Pennsylvania has admitted in the subsequent district court proceeding that "the disclosure provisions make available information which enables opponents of abortion to direct their protests against those facilities which perform many abortions or inordinate numbers of late-term abortions."<sup>26</sup>

<sup>25</sup> The disclosure of this type of information in reports required by other public disclosure provisions of the 1982 Act has been preliminarily enjoined because "there is a reasonable probability that the disclosure requirements will result in increased threats, harassment, or reprisals and will therefore impose a legally significant burden on the constitutional right to choose to have an abortion." 1985 district court decision, *supra* p. 7, at 31.

<sup>26</sup> Defendants' Memorandum of Law in Opposition to a Preliminary Injunction Against Enforcement of the Public Disclosure Requirements of § 3207(b) and 3214(f) of the Pennsylvania Abortion Control Act at 8 n.4 (hereinafter cited as "Defendants' Opposition Memorandum"), filed in the subsequent district court proceeding.

Post-abortion identification of patients can serve two objectives of those who wish to deter women from choosing abortion. First, the possibility of public identification could act as a general deterrent upon women who are considering abortion. "In Charleston, West Virginia, right-to-life protesters photograph patients as they enter the Women's Health Center, causing them to worry that their picture may appear in the local newspaper." *The Holy War* at 6. Second, antiabortion groups such as Women Exploited By Abortion (hereinafter "WEBA"), are interested in persuading women who have undergone abortions to become converts "committed to ministering to women who need to be set free from the bondage of abortions."<sup>27</sup> The intrusive nature of such recruiting efforts is apparent.

The 1982 Act's disclosure requirements will enable anti-abortionists to identify more easily those seeking or providing abortion services. Armed with this information, the activists can more easily target facilities and individuals for harassment and attack. The methods currently employed by antiabortion activists are tailored to the information currently available.<sup>28</sup> The increased availability of confidential information will result in placing more obstacles in the paths of women who may choose abortion to terminate their pregnancies. The dangers of making such

<sup>27</sup> See the WEBA Brochure, copies of which are being lodged with the Clerk of the Court.

One way to make up for the loss of one's child is to help prevent another woman from destroying hers. \* \* \* We must be bold in asking people with special knowledge and experience to use it in the abortion battle. It is sometimes difficult to talk them into exposing their dark secrets. . . .

<sup>28</sup> *99 Ways* at 228-29.

There is a lot of imagination and creativity still untapped in the pro-life ranks. There are effective means of carrying on the guerilla warfare necessary for victories in the battle against abortion. *There are many ideas not mentioned here because we haven't thought of them yet.*

*99 Ways* at 341 (emphasis added).



information available are, moreover, recognized by the practices of other states and professional organizations.<sup>29</sup>

### B. The Pennsylvania Disclosure Requirements Interfere with the Availability of Safe Abortion Services

Access to abortion services in the United States currently is limited geographically.

Seventy-eight percent of all U.S. counties—containing 28 percent of women aged 15-44—had no identified provider of abortion services in 1982. Only two percent of abortions were performed in nonmetropolitan counties in that year, although 26 percent of women of reproductive age live in such counties. Fully 87 percent of nonmetropolitan counties had no abortion providers at all in 1982.

Despite the concentration of abortion services in urban areas, 47 percent of metropolitan counties also had no abortion service providers in 1982.

Henshaw, Forrest & Blaine, *Abortion Services in the United States, 1981 and 1982*, 16 Fam. Plan. Persp. 119 (May/June 1984). The disclosure requirements of the 1982 Act would further limit the availability of abortion services by exposing all abortion providers to harassment and violence.

Antiabortionist literature is replete not only with suggestions of how to apply pressure to physicians and abortion clinics, but also with success stories about providers who have been put out of business.<sup>30</sup> The disclosure re-

<sup>29</sup> See *infra* pp. 27-30.

<sup>30</sup> See, e.g., *Pensacola Abortionist Quits; Faced Insurance Problems, Eviction*, ALL (American Life Lobby, Inc.) News, June 28, 1985, at 1 (doctor's office had been destroyed by a bomb); *Dallas Abortionist Quits After Picket of Residence; Activists Close Pa. Abortuary; Prevent Its Relocation*, ALL News, June 7, 1985, at 1; *Pa. Doctor Resigns from N.Y. Abortuary After Private Practice Is Picketed*, ALL News, May 3, 1985, at 3; *San Diego Abortuary Burned Again—\$25,000 in Damages Sustained*, ALL News, Apr. 19, 1985, at 3; *Pickers Target Doctors' Offices; Two Doctors Stop Doing Abortions*, ALL News, Mar. 29, 1985, at 2; *Abortionist Quits Amid Protest*, The Life Advocate, July 1985, at 3; see also 99

quirements of the 1982 Act would enable antiabortion activists to target additional facilities and physicians, as well as specific facilities and physicians, for maximum impact. If the pressure tactics advocated by antiabortion groups are successful in closing down abortion facilities, women who choose abortion will be forced "to travel to find available facilities, resulting in both financial expense and additional health risks." *Akron*, 462 U.S. at 435. Thus, the disclosure requirements of the 1982 Act would unconstitutionally restrict the availability of abortion services.

The disclosure requirements of the 1982 Act also may enable antiabortionists to interfere with the provision of safe abortion services. Antiabortionists boast that their activities increase the incidence of complications resulting from abortions.

[W]hen pro-life pickets are outside a clinic, complications and confusion inside the clinic increase by as much as 400 percent. \* \* \* Consider that if our presence at clinics causes four times more confusion and complications than there would be if we were not there, then it is obvious that we should be there every time they operate. \* \* \* The only way to avoid complications is to avoid abortions.

99 Ways at 74-76.

In *Bering v. SHARE*, the Washington State Superior Court found that "the picketing and 'counseling' . . . has caused Plaintiffs and patients or visitors to the Medical Building severe emotional distress, and has created a substantial risk of physical and mental harm to patients and visitors. . . ." Findings of Fact and Conclusions of Law at 4.

By enabling antiabortion activists to target additional facilities and doctors and to target specific facilities and

Ways at 151-53 (Picket the Abortionists' Homes); 171-75 (Gather Evidence Against the Abortionists); 176-77 (File Suit Against the Abortionists); 197-99 (Use Pressure); 211-13 (Keep the Abortionists Out of Your Community).



doctors for maximum impact, the public disclosure requirements may jeopardize the health of women who choose abortion. The findings in the 1985 district court decision include the example of a young woman who had just undergone an abortion and whose car locked bumpers with another car as she was attempting to leave the parking lot. A crowd of antiabortion protesters taunted the woman and not only refused to help, but also commented, "It looks pretty bad, but it's not as bad as what you just did in there." The woman, who was crying and becoming increasingly upset, got out of her car and tried manually to disengage the bumpers, "threatening physical injury to herself." Slip op. at 8. The court's findings also discuss a patient under general anesthesia who awoke in the open air during winter weather because a bomb threat forced the clinic to evacuate. Slip op. at 13.

**C. The Pennsylvania Disclosure Requirements Unconstitutionally Violate Patients' Privacy Rights and Impair the Abortion Decision**

In *Planned Parenthood v. Danforth*, 428 U.S. at 81, this Court upheld recordkeeping requirements of the Missouri statute because they "properly respect[ed] a patient's confidentiality and privacy." Unlike the Pennsylvania statute, the Missouri statute in *Danforth* required that the records "shall be confidential and shall be used only for statistical purposes." *Id.* at 79. The records were permitted to be inspected only by government "public health officers" and were to be kept only "for seven years in the permanent files of the health facility where the abortion was performed." *Id.* These safeguards assisted in persuading this Court that the requirements were within constitutional limits. *Id.*<sup>31</sup>

Under Pennsylvania's 1982 Act, however, a woman choosing to terminate her pregnancy through abortion

<sup>31</sup> In *Planned Parenthood v. Ashcroft*, 462 U.S. at 489-90, this Court upheld a statutory provision requiring a pathology report for each abortion performed and noted that "Missouri extends the identical safeguards found reassuring in *Danforth* to the pathology reports at issue here." *Id.* at 490 n.14.

must publicly disclose personal and medical details. The unconstitutional deterrent impact of such disclosure on "the woman's exercise of her right," *Akron*, 462 U.S. at 430, is apparent.<sup>32</sup> In addition, the 1982 Act unconstitutionally forces a woman to choose between two privacy rights, both of which are protected by the Fourteenth Amendment. These rights were identified in *Whalen v. Roe*, 429 U.S. 589 (1977): "One is the individual interest in avoiding disclosure of personal matters and another is the interest in independence in making certain kinds of important decisions." *Id.* at 599-600. As applied in the abortion context, these privacy rights are the woman's right to maintain confidentiality about her abortion and her freedom to decide whether or not to terminate her pregnancy through abortion.

*Whalen* upheld New York's filing requirements for certain drug prescription records that aided in the enforcement of laws aimed at minimizing the misuse of dangerous drugs. 429 U.S. at 597-98. This Court relied heavily on the fact that "[p]ublic disclosure of the identity of patients [was] expressly prohibited by the statute and by a Department of Health regulation," and the fact that elaborate security measures prevented disclosure to anyone except a small number of Department of Health employees and investigators. *Id.* at 594-95.

Disclosure of records about individual abortions and complications as required by the 1982 Act would impair both of the privacy interests identified in *Whalen*, without the safeguards of the New York statute. "[T]he right to collect and use [personal] data for public pur-

<sup>32</sup> See *Slevin v. New York*, 551 F. Supp. 917, 934-35 (S.D.N.Y. 1982):

The degree of intrusion stemming from public exposure of the details of a person's life is exponentially greater than disclosure to government officials. . . . The mere fact that private information is available on demand to individuals who know what is sensitive and how to exploit it adds greatly to the inhibition, anxiety and embarrassment that the same disclosure might cause if restricted to the government.

poses is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures." *Whalen*, 429 U.S. at 605; see *infra* p. 27. In contrast, Pennsylvania's 1982 Act expressly mandates disclosure of sensitive patient information to any interested member of the public. The Pennsylvania disclosure provisions unconstitutionally infringe on both privacy rights guaranteed by the Fourteenth Amendment, by forcing a woman to reveal confidential information about her abortion and by depriving her of her independence in the abortion decision.<sup>33</sup>

The mere nondisclosure of the woman's name in the Pennsylvania reports does not protect her privacy. Courts have recognized in other areas of the law that individuals can be identified without being named. In libel cases, for example, a plaintiff need not be named for a statement to be held libelous, so long as "the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant." *Fetler v. Houghton Mifflin Co.*, 364 F.2d 650, 651 (2d Cir.

<sup>33</sup> Another district court has applied the *Whalen* analysis to analogous disclosure requirements:

This possibility of disclosure is far from innocuous and could damage the woman's right to privacy in at least two ways. First, highly personal information about the woman may be publicly revealed. To the extent that abortions past midterm are stigmatizing, disclosure could damage a woman's reputation. Second, the chance of disclosure could indirectly affect a woman's independence in deciding whether to have the abortion. A woman might choose not to have an otherwise necessary abortion if she knew that her decision could become virtually a matter of public record.

*Wynn v. Scott*, 449 F. Supp. 1302, 1328 (N.D. Ill. 1978); see also *Doe v. Rampton*, 366 F. Supp. 189, 193 (D. Utah 1973) ("[the disclosure section] is invalid because it subjects the abortion decision to public scrutiny by making the details of every abortion a matter of public record and thus chills exercise of the right of privacy in the abortion decision").

1966).<sup>34</sup> This Court recently recognized that a person's identity could be discovered by piecing together bits of superficially innocuous data. *Central Intelligence Agency v. Sims*, 105 S. Ct. 1881, 1892-93 (1985), upheld the power of the director of the Central Intelligence Agency to withhold institutional affiliations of "intelligence sources" because "[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may place the questioned item of information in its proper context." (Citations omitted.)

The disclosure provisions may also inhibit the candor essential to a meaningful doctor-patient relationship. This Court has established that the "physician, in consultation with his patient, [must be] free to determine, without regulation by the state, that, in his medical judgment, the patient's [first-trimester] pregnancy should be terminated." *Roe v. Wade*, 410 U.S. at 163 (emphasis added). "The medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial and the woman's age—relevant to the well-being of the patient." *Doe v. Bolton*, 410 U.S. 179, 192 (1973). If a woman fails to provide a complete and accurate medical record to the doctor because she fears public disclosure, the meaningful exercise of her doctor's medical judgment would inevitably be impaired.<sup>35</sup>

<sup>34</sup> *Accord Avins v. White*, 627 F.2d 637, 643 (3d Cir.), cert. denied, 449 U.S. 982 (1980); *Dion v. Kiev*, 566 F. Supp. 1387, 1389 (E.D. Pa. 1983); *Miller v. Lear Siegler, Inc.*, 525 F. Supp. 46, 57-58 (D. Kan. 1981). See generally *Restatement (Second) of Torts* § 564 comment b (1977) ("It is not necessary that the plaintiff be designated by name; it is enough that there is such a description of or reference to him that those who hear or read reasonably understand the plaintiff to be the person intended.").

<sup>35</sup> Instead of giving [the doctor] an accurate medical history, she might well hide previous abortions, past incidents of venereal disease, or other data about her sexual activity that might be embarrassing but extremely relevant to a doctor's treatment



Until the end of the first trimester, "a pregnant woman must be permitted, in consultation with her physician, to decide to have an abortion and to effectuate that decision 'free of interference by the State.'" *Akron*, 462 U.S. at 429-30 (quoting *Roe v. Wade*, 410 U.S. at 163).<sup>26</sup> The court below found that the increased cost of recordkeeping resulting from these requirements would have a significant impact on the abortion decision. 737 F.2d at 302.<sup>27</sup> In addition, as demonstrated above, Pennsylvania's disclosure requirements further interfere significantly with the abortion decision and the physician-patient relationship by invading privacy rights guaranteed by the Fourteenth Amendment and by subjecting abortion providers and their patients to increased harassment. This Court has held that public disclosure of information could not constitutionally be required where there was a "reasonable probability" that disclosure would subject the persons identified to "threats, harassment or reprisals." *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 100-02 (1982).<sup>28</sup>

and advice. This is a clear constraint on the development of a candid doctor-patient relationship.

*Margaret S. v. Edwards*, 488 F. Supp. 181, 214 (E.D. La. 1980).

<sup>26</sup> In *Harris v. McRae*, 448 U.S. 297, 315 (1980), this Court upheld the Hyde Amendment, which generally precludes the use of federal funds to reimburse the costs of abortions under Medicaid, because it placed no governmental obstacle in the path of a woman to choose abortion. See also  *Maher v. Roe*, 432 U.S. 464, 475-76 (1977) (distinguishing *direct state interference* with a protected activity from *state encouragement* of an alternative activity).

<sup>27</sup> The court referred to this Court's warning in *Danforth* that "recordkeeping and record-maintaining provisions must not be 'utilized in such a way as to accomplish, through the sheer burden of recordkeeping detail, what we have used today to be an otherwise unconstitutional restriction.'" 737 F.2d at 302 (quoting *Planned Parenthood v. Danforth*, 428 U.S. at 81).

<sup>28</sup> In *Brown*, this Court concluded that, "In light of the substantial evidence of past and present hostility from private persons and government officials against the SWP, Ohio's campaign disclosure requirements cannot be constitutionally applied to the Ohio SWP." *Id.* at 102. See also *NAACP v. Alabama ex rel. Patterson*, 357 U.S.

## II. THE PENNSYLVANIA DISCLOSURE REQUIREMENTS ARE NOT JUSTIFIED BY ANY COMPELLING STATE INTEREST AND ARE INCONSISTENT WITH ACCEPTED PRACTICES IN THE COMPILATION OF HEALTH STATISTICS

### A. Pennsylvania Has Not Demonstrated Any Compelling Interests

"Where certain 'fundamental rights' are involved, the Court has held that regulations limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Roe v. Wade*, 410 U.S. at 155. Pennsylvania has not met, nor can it meet, this burden.

Pennsylvania's brief in this Court has not identified any compelling interests to justify the extraordinary disclosure requirements of the 1982 Act.<sup>29</sup> In the district court proceedings subsequent to the court of appeals decision, Pennsylvania identified four interests allegedly supporting disclosure of abortion information:

ensuring that shoddy practitioners do not hide behind the corporate veil, aiding citizens in the exercise of their first amendment rights to oppose abortion, providing a pool of statistical and medical knowledge, and protecting the public's freedom to

449, 462, 466 (1958) ("immunity from state scrutiny of [NAACP] membership lists" was "so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment," in light of the showing that disclosure of the identity of the NAACP's members had "exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.")

<sup>29</sup> Appellants' discussion of the disclosure requirements is limited to a footnote: "Of course, our argument that the reporting requirements are valid subsumes the related contention that the information gathered from these reports must be made available if it is to be useful." Brief for Appellants at 63 n.21. Appellants have not, however, offered any explanation why detailed personal and other abortion information must be made public to be useful.



choose medical providers in accordance with their beliefs.

1985 district court decision, slip op. at 20.

This Court, however, has recognized only two compelling state interests that justify regulation of abortion: protection of maternal health and protection of the potential life of the fetus. *Roe v. Wade*, 410 U.S. at 159. The state's interest in the health of the mother arises after the end of the first trimester and "from and after this point, a state may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." *Id.* at 163; see also *Akron*, 462 U.S. at 430. The state's interest in potential life arises at viability, when "the fetus . . . presumably has the capability of meaningful life outside the mother's womb." 410 U.S. at 163. The state may regulate to protect fetal life after viability, except that the state may not proscribe abortion when it is necessary to preserve the life or health of the mother. *Id.* at 163-64.

Pennsylvania's interests in exposing shoddy practitioners and collecting statistical information, while peripherally related to protection of maternal health and potential life, do not rise to the level of compelling state interests. See, e.g., 1985 district court decision, slip op. at 42. Moreover, it is difficult to discern why detailed information about specific abortion providers and their patients need ever be disclosed to the public to serve these interests. Information about complications can more than adequately be monitored by designated health officials, as is done in other states.

To the extent that the Pennsylvania disclosure provisions are designed to advance the agenda of antiabortionists, they do not serve "compelling state interests."<sup>40</sup>

<sup>40</sup> Appellants argued in the subsequent district court proceeding that if the state "may influence women throughout their pregnancies to forego abortions in favor of childbirth, [it may] . . . take the substantially less intrusive step of providing its citizens with the

Insofar as Pennsylvania relies on the interests of third parties in opposing abortion and boycotting providers of abortion services, it seeks to accomplish indirectly that which it cannot do directly: interfere with the woman's abortion decision. *Danforth* held that the state may not delegate to a spouse the power to veto an abortion which the state itself is prohibited from exercising. 428 U.S. at 69. Pennsylvania's disclosure provisions similarly delegate to antiabortionists the power to interfere with the woman's right to choose abortion. *Akron* held that a state may not adopt regulations designed to influence a woman's informed choice between abortion and childbirth. 462 U.S. at 444. By adopting regulations designed to permit third parties to influence a woman's informed choice, Pennsylvania violates both the letter and spirit of this Court's decisions concerning the right to choose abortion.

#### **B. The Pennsylvania Disclosure Requirements Are Inconsistent with the Practices of Other States, the Federal Government and Professional Organizations that Compile Health Statistics**

While 26 other states statutorily require reports about abortions, no other state requires public disclosure of such reports. Moreover, 23 of those states explicitly mandate that these reports be treated confidentially.<sup>41</sup> The 1982 Act also is inconsistent with procedures of the Centers for Disease Control of the United States Department of Health and Human Services ("CDC") and professional organizations such as the Alan Guttmacher Institute and NAF. The procedures of these organizations for collecting and reporting abortion information reflect the accepted practice of disclosing only aggregate data concerning abortions and abortion practices while maintain-

information essential for them to exercise freedom of association." Defendants' Opposition Memorandum at 12. See also the discussion of the legislative history, *supra* p. 6.

<sup>41</sup> See App. C and D. of the Brief *Amici Curiae* of the American Civil Liberties Union, *et al.*

ing confidentiality about specific abortion providers and their patients.

The objectives of the CDC's surveillance are to document the number and characteristics of women obtaining abortions and to eliminate preventable mortality and morbidity related to abortion. Centers for Disease Control, U.S. Dep't. Health & Human Serv., *Abortion Surveillance 1979-1980* at Preface (1983). The CDC achieves these objectives without sacrificing the confidentiality of information about abortion providers and their patients. The CDC collects abortion statistics by state of occurrence from health departments, hospitals and/or other medical facilities and the National Center for Health Statistics and publishes the collected statistical information only *in the aggregate*.<sup>42</sup>

The Alan Guttmacher Institute, a private institution for research, policy analysis and public education, also protects from disclosure information about specific abortion facilities in its reporting of statistical data about abortions. The Guttmacher Institute published a survey in 1983 that analyzed information collected about abortions in the United States in 1979 and 1980 and presented data in *aggregate* form only. Even the number of facilities in certain locations was suppressed. The results of the Guttmacher Institute's eighth abortion survey covering the years 1981 and 1982 again were reported in *aggregate* form only in *Abortion Services in the United States, 1981 and 1982*, *supra* p. 18, at 119.

<sup>42</sup> The Brief *Amici Curiae* of Watson D. Bowes, Jr., M.D. and Richard T.S. Schmidt, M.D. in Support of Appellants ("Bowes-Schmidt Brief") relies on information collected by the CDC for the argument that the reporting requirements of § 3214 merely "set[] forth standard bookkeeping requirements" in the area of vital statistics. Bowes-Schmidt Brief at 3. Appellants also attempt to analogize the 1982 Act's disclosure requirements to the CDC's collection of data. Brief for Appellants at 61. In addition to some significant differences between the data collected by the CDC and Pennsylvania, these arguments fail to point out that the CDC does not make public the information it collects from specific facilities and physicians.

In the course of its data collection efforts in 1981, the Guttmacher Institute was unable to collect abortion information from the state health departments in six relatively large states. Although these states previously had shared abortion information with the Institute, "due to local harassment by abortion opponents, many health departments have instituted a policy of confidentiality in order to encourage provider cooperation with data collection efforts." Alan Guttmacher Institute, *Abortion Services in the United States, Each State & Metropolitan Area, 1979-1980* at 99 (1983).

NAF also collects and reports aggregate health-related data about abortions performed by its membership.<sup>43</sup> Like the Guttmacher Institute, NAF treats with confidentiality the data it receives about individual institutions. Further, NAF does not collect or report any information that would identify or facilitate the identification of patients.

The maintenance of complete and accurate records is important for quality patient care and meaningful review of services. Reporting of legally induced abortions to public agencies where required and to non-public agencies is essential for providing and improving maternal health and family planning services. *Confidentiality of individual patient identity is essential and must be safeguarded in abortion reporting.*

Reporting Standards, NAF *Standards for Quality Care* at 21 (emphasis added).

<sup>43</sup> NAF requires that its members provide on a quarterly basis the following health-related data: number of abortions performed; length of gestation; percentage of patient follow-up contact within six weeks of the abortion; number of deaths; number of patients receiving one or more blood transfusions; occurrence of perforations; occurrence of pelvic infection requiring hospitalization for at least 72 hours within two weeks of the abortion; and the number of repeat abortion procedures because of retention of tissue within one month of the original procedure. Copies of NAF's reporting forms entitled "Quarterly Abortion Report" and "Individual Complication Report" are being lodged with the Clerk of the Court.



The public disclosure of individualized reports about specific abortion providers and patients required by the 1982 Act differs sharply from the accepted practice of guarding the confidentiality of medical records in general.<sup>44</sup> Although Pennsylvania no longer treats information and documents about abortions with the "confidentiality customarily accorded to medical records," as it did under § 6606(d) of the 1974 Abortion Control Act, Pennsylvania still requires that the Department of Public Welfare maintain the confidentiality of medical records of persons applying for medical assistance benefits. 62 Pa. Cons. Stat. Ann. § 1404(c) (Purdon Supp. 1985). As Pennsylvania recognizes the privacy interests of persons seeking medical assistance benefits, it is difficult to discern any legitimate rationale for the 1982 Act's public disclosure requirements of medical records relating to abortions.

The public disclosure requirements of the 1982 Act are not "reasonably directed to the preservation of maternal health" nor do they "properly respect a patient's confidentiality and privacy." *Danforth*, 428 U.S. at 81. Accordingly, these sections of the 1982 Act must be struck down as unconstitutional.

### CONCLUSION

For all of the foregoing reasons, this Court should affirm the decision below of the United States Court of Appeals for the Third Circuit.

<sup>44</sup> Information disclosed to a physician in the physician-patient relationship is treated confidentially. See, e.g., Principle 5.05 of the Principles of Medical Ethics, *Current Opinions of the Judicial Council of the American Medical Association* (1984); American Medical Association ("AMA"), *Model State Legislation on Confidentiality of Health Care Information* (1981); American Medical Record Association ("AMRA"), *Confidentiality of Patient Health Information* (1981); and AMRA, *Confidentiality and Security of Secondary Health Records* (1984). In § 3(c) of its model state legislation, the AMA defined "confidential health care information" as "information relating to a person's health care history, diagnosis, condition, treatment or evaluation."

Respectfully submitted,

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Counsel for

National Abortion Federation

Dated: August 30, 1985

\* Counsel of Record

# REPORT OF INDUCED TERMINATION OF PREGNANCY

FORMS MUST BE SUBMITTED TO THE PENNSYLVANIA DEPARTMENT OF HEALTH WITHIN 15 DAYS AFTER EACH REPORTING MONTH. THE SECOND COPY OF THE FORM WILL BE AVAILABLE FOR PUBLIC INSPECTION AND COPYING.

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| FACILITY NAME                   |  | FACILITY CODE                  |  | COUNTY OF INDUCED TERMINATION |  | ICD CODE                        |  | DATE OF INDUCED TERMINATION      |  |
| 1. NAME OF FACILITY             |  | 2. ADDRESS                     |  | 3. CITY                       |  | 4. STATE                        |  | 5. ZIP CODE                      |  |
| 6. TYPE OF FACILITY             |  | 7. DATE OF INDUCED TERMINATION |  | 8. COUNTY                     |  | 9. ICD CODE                     |  | 10. DATE OF INDUCED TERMINATION  |  |
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# REPORT OF INDUCED TERMINATION OF PREGNANCY

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## NOTICES

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| 5. DATE OF INDUCED TERMINATION   |  | 6. TIME OF DAY                   |  | 7. NAME OF PHYSICIAN             |  | 8. PHYSICIAN'S LICENSE NO.        |  |
| 9. NAME OF PATIENT               |  | 10. DATE OF BIRTH                |  | 11. AGE                          |  | 12. SEX                           |  |
| 13. RACE                         |  | 14. ETHNICITY                    |  | 15. MARITAL STATUS               |  | 16. OCCUPATION                    |  |
| 17. EDUCATION                    |  | 18. RELIGION                     |  | 19. PREVIOUS ABORTIONS           |  | 20. PREVIOUS TERMINATIONS         |  |
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## NOTICES

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COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF HEALTH

## ABORTIONS: REPORT OF COMPLICATIONS

Effective December 8, 1982, every physician who provides medical care or treatment to a woman because of complications resulting from an abortion or attempted abortion must file a report with the Bureau of Quality Assurance, Pennsylvania Department of Health, P.O. Box 90, Harrisburg, Pennsylvania 17108. Reports are due within 30 days of the date physician first examines the woman.

- Age of patient:
- Previous pregnancies:
 

|                              |                               |                                      |                                  |
|------------------------------|-------------------------------|--------------------------------------|----------------------------------|
| Live Births                  |                               | Other Terminations                   |                                  |
| <input type="checkbox"/> Now | <input type="checkbox"/> Dead | <input type="checkbox"/> Spontaneous | <input type="checkbox"/> Induced |
- If previous induced termination(s), type of procedure (check all that apply):
 

|   |                          |                  |                          |
|---|--------------------------|------------------|--------------------------|
| Suction curettage (includes D&E)        | <input type="checkbox"/> | With oxytocin    | <input type="checkbox"/> |
| Sharp curettage (includes D&E)          | <input type="checkbox"/> | With lignocaine  | <input type="checkbox"/> |
| dilation and evacuation                 | <input type="checkbox"/> | Hysterotomy      | <input type="checkbox"/> |
| Interuterine Saline Instillation        | <input type="checkbox"/> | Hysterectomy     | <input type="checkbox"/> |
| Interuterine Prostaglandin Instillation | <input type="checkbox"/> | Other (specify): | <input type="text"/>     |
- Facility where abortion was performed:
 

|                      |                      |
|----------------------|----------------------|
| <input type="text"/> |                      |
| <input type="text"/> |                      |
| <input type="text"/> | <input type="text"/> |
| MOB OFFICE           | STATE ZIP CODE       |
- Date of abortion:
- Estimated menstrual weeks of gestation:

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NOTICES

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ABORTIONS: REPORT OF COMPLICATIONS

PAGE 2 OF 2

6. Type of termination procedure (check all that apply):

- |   |                          |                  |                          |
|---|--------------------------|------------------|--------------------------|
| Suction curettage (includes D&E)          | <input type="checkbox"/> | With anesthesia  | <input type="checkbox"/> |
| Sharp curettage (includes D&E)            | <input type="checkbox"/> | With anesthesia  | <input type="checkbox"/> |
| Scrub and Evacuation                      | <input type="checkbox"/> | Hysteroscopy     | <input type="checkbox"/> |
| Inter-uterine Saline Irrigation           | <input type="checkbox"/> | Hysterotomy      | <input type="checkbox"/> |
| Inter-uterine Potassium Iodide Irrigation | <input type="checkbox"/> | Other (specify): | <input type="checkbox"/> |

7. Nature of complication or complications:

8. Medical treatment given:

9. Nature and extent of any permanent condition caused by the complication:

10. Date of first examination of patient:

Physician's Signature

License No.

Date Submitted

(Pa. R. Doc. No. 65 (10) First December 1, 1982  
5.00 x 8.5)